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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1939.

No. 597.

WESTERN UNION TELEGRAPH COMPANY, a corporation,

Petitioner,

vs.

PAUL NESTER and JUAN CHARLES, co-partners,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS.

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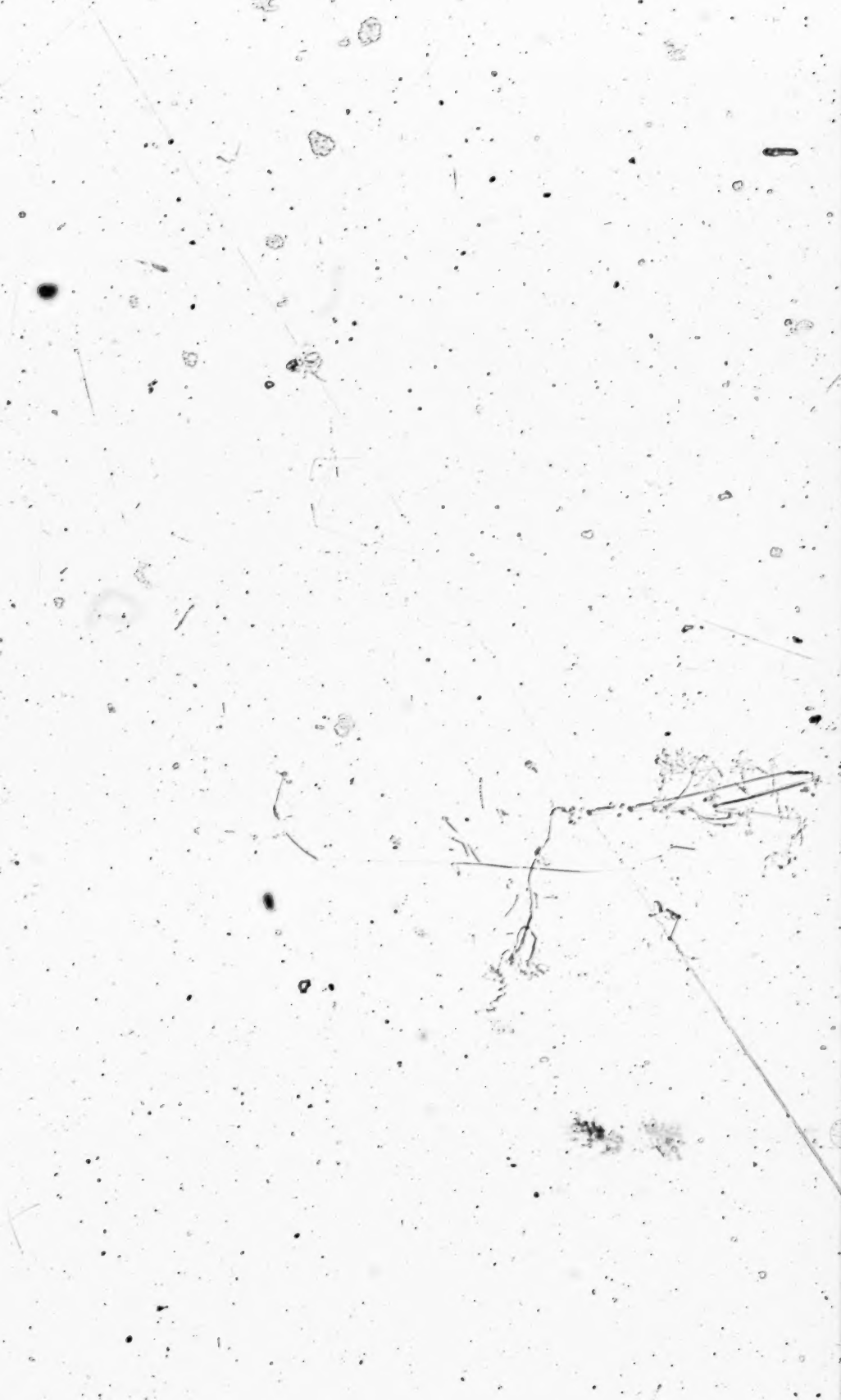

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BRIEF FOR RESPONDENTS.

Opinion Below.

The opinion of the Circuit Court of Appeals [R. 144] is reported at 106 F. (2d) 587. The District Court rendered two opinions [R. 21, 39], both of which are reported at 25 Fed. Supp. 478.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered September 15, 1939 [R. 159]. A timely petition for rehearing was denied November 27, 1939 [R. 159]. The petition for certiorari was filed December 18, 1939, and was granted January 29, 1940. The jurisdiction of this Court is invoked under section 240 (a) of Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case.

We agree with the statement of the case as set forth in petitioner's brief except that portion stating that the District Court held that respondents had failed to prove that they had suffered any damage by reason of the non-payment of the money; we also except to that portion wherein it is stated that the court directed the entry of judgment against petitioner on the ground that the provision in its money order tariff was a provision for liquidated damages. On the contrary, the court found that by reason of the failure of petitioner to deliver said money respondents suffered damages in the sum of five hundred dollars [Finding XII, R. 47], and this finding is amply supported by the evidence [R. 69, 83, 102-105, 121]. Moreover, as a conclusion of law from the facts found, the Court held that the condition on the back of petitioner's money order blank *limiting its liability*[1] to five hundred dollars is a valid undertaking. [Conclusions I, R. 47].

Summary of the Argument.

1. The writ of certiorari should be dismissed on the ground that it was improvidentially granted.

2. The finding of the trial court that respondents suffered damages in the sum of $500 is amply supported by the evidence, and is not based upon any theory of liquidated damages.

3. In any event, the theory set forth in the opinion (that the case was controlled by a provision for liquidated damages) is sound and would support the judgment.

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[1] All italics in this brief ours unless otherwise stated.

ARGUMENT.

1. The Writ of Certiorari Should Be Dismissed on the Ground That It Was Improvidentially Granted

Despite the findings of fact, conclusions of law and the judgment rendered thereon [R. 43-50], petitioner, nevertheless, earnestly contends, both in its petition for the writ and in its brief, that the question presented is: Does the limitation of liability provision in petitioner's money order tariff—which is substantially the same as that in its telegraph tariff—constitute a liquidated damage provision which would automatically make petitioner liable for damages in the fixed sum of $500, in case of default of service, regardless of whether or not the sender had sustained any actual damage, or is the provision rather one which fixes a maximum limit within which damages may be proved?

That such an inquiry, however, cannot be predicated on the record is, we think, manifest. The trial court found as a fact:

> "That it is not true that by reason of the failure of the defendant, Western Union Telegraph Company, to transmit and to deliver and to pay promptly said money order as aforesaid, the plaintiffs have suffered damages in the sum of seventy-six hundred ($7,600) dollars; *the court finds, however, that by reason of such failure, the plaintiffs have suffered and sustained damages, loss and injury in the sum of five hundred ($500) dollars*" [Finding XII, R. 47].

As a conclusion of law from the facts found, the court held that the condition on the application for the transmission of the money order filed by petitioner with the Federal Communications Commission *limiting its liabilities* to $500 is a valid undertaking [Conclusion I, R. 47].

Judgment for $500 was entered thereon [R. 50].

Since, therefore, the Trial Court made, signed, and filed said findings of fact and conclusions of law together with a judgment responsive thereto, we submit that the writ of certiorari should be dismissed on the ground that it was improvidentially granted.

2. The Finding of the Trial Court That Respondents Suffered Damages in the Sum of $500 Is Amply Supported by the Evidence.

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses.

Rule 52 Federal Rules Civil Procedure.

As heretofore stated, the court found that by reason of the failure of petitioner to deliver said money respondents suffered damages in the sum of $500. Accordingly, the inquiry is whether the evidence will support the finding.

Among the items of special damage alleged in the bill of complaint was a shipment of goods reasonably worth $500 [Complaint XIV, R. 7]. The evidence shows that on or about August 2nd, 1937, respondent Nester shipped from Los Angeles to respondent Charles in Honduras, a shipment of gasoline and miscellaneous articles of the

value of $500 [R. 67-71, 80-83]; that this shipment arrived in Honduras on August 15, 1937 [R. 67, 81]; that Charles had no money to pay the charges on the shipment when it arrived [R. 91-92]; that the shipment was confiscated by the Hondurian government [R. 83]; Nester testified that because of the confiscation of the gasoline he and his partner were compelled to shut down the operation of the mill at the mine for three months [R. 82].

While it is true that the actual date of confiscation was not shown, yet it appears from the law of Honduras that the property was subject to confiscation 21 days after its arrival. Article 7 of petitioner's Exhibit C [R. 102] classifies merchandise which is entitled to *six days free deposit;* articles shipped by respondent [R. 69] come under this classification. Following article 7 further [R. 104], it states:

> "Two centavos shall be charged daily for Kilogram of merchandise after the fixed period of time has elapsed, to cover the expense of safe keeping the articles under the custody of the state shall not exceed *the period of six days* on the following goods: (The goods listed do not include those here involved) *And fifteen days on all others* (The goods listed include those here involved)."

It will be observed that all of the goods shipped by respondent come within the class of goods allowed *six days free deposit and fifteen days charge* [R. 69, 102-105]; so assuming that the goods arrived in Honduras on the 15th day of August, 1937, they were not subject to confiscation

until the 5th day of September, 1937, which was after Charles would have received the money, had it been promptly delivered by petitioner [R. 116].

Article 9 [R. 105] states:

> "The cargo referred to in Article 7th and 8th, shall be considered as of compulsory shipment, and its *custody* or reshipment *must* be applied for within the *time* and *conditions* established for deposits."

Article No. 41 [R. 105] reads:

> "The merchandise *shall become* the property of the state, and *will be sold* at public auction, whenever its *custody, deposit,* or *reshipment* are not requested as prescribed by law . . . ."

In the absence of contrary evidence we must presume that official duty was regularly performed, and that the above law was obeyed. (California Code Civil Procedure, Sections 1963 (15) and (33).)

The testimony of respondent Charles strongly supports this view. He testified that he was first notified of the arrival of the goods in Amapala, Honduras, by a letter "sent to me about four or five days after the arrival of the cargo and was received by me about four days after that date." [R. 90-91, 118.] He further testified: "If I remember rightly, the Government after the cargo gets in allows eight days. From that time on, they *charge* you two cents per kilo every 24 hours. In our case that would figure up to 36 Lempira every 24 hours" [R. 91-92].

Indeed, a further inference may be drawn from the evidence to the effect that the goods were not confiscated until a date subsequent to the 14th day of September, 1937,—a date when the money had not arrived as yet. Charles further testified: "On September 13, 1937, or thereabouts, I communicated with Mr. Nester (the Los Angeles partner) about this $150." [R. 83.] On further examination by the Court [R. 121], he stated: "I went down to Amapala about September 14, 1937. Up to that time, I did not go there at all. I wrote several letters asking our agent at Amapala if he would not please intercede for us with the Administrator of the Customs." It would appear from these two statements that the goods had not as yet been confiscated; otherwise, what good would intercession do if they already had been? Charles' subsequent statements [R. 121] as to the particular date of confiscation for the nonpayment of the charges may very well be taken to refer to some date beyond September 14th.

Manifestly, the foregoing evidence is at least susceptible of two inferences, both of which are equally cogent: First, that the goods were confiscated on the 5th day of September, 1937; and secondly, that confiscation might have taken place on or about the 14th day of September, 1937.

Despite the foregoing evidence and findings made by the trial court, petitioner nevertheless quotes freely from the memorandum opinions of the trial judge in order to impeach the actual findings so made and labelled.

This attack on the judgment is, in our opinion, untenable for two reasons. In the first place, the opinions of the trial judge cannot be resorted to for the purpose of controlling, modifying, or supplementing the findings otherwise disclosed by the record.[2] In the second place, the findings of the trial court [R. 47] were made and filed subsequent to the filing of the opinions; and such findings were specifically made after the request of petitioner "to add a new paragraph to the proposed Findings of Fact" stating that respondents *suffered no loss or damage* [R. 34, 43]. And even if as alleged that the judge made contrary "findings" in his opinions, still we submit he had a right to change his mind before signing and filing the "actual" findings which he so labeled and designated. It is these latter findings which constitute the judgment, and not anything that the judge might or might not have said in his memorandum opinions written prior thereto. See Rule 52, Rules of Civil Procedure.

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[2]See *Thompson, Starret v. Labelle Iron*, 17 Fed. (2d) 536; *U. S. v. Shingle*, 91 Fed. (2d) 85; *U. S. v. Sioux City Stockyards*, 167 Fed. 126.

Exceptions, perhaps, are admiralty cases and cases on the equity side of the docket where the decree rendered is not responsive to the findings and is so ambiguous as to necessitate a resort to the opinion to determine what actually was decided. See *Hall v. U. S.*, 267 Fed. 795; *Bankers Trust v. Henwood*, 88 Fed. (2d) 163; *National Laundry etc. v. Oconto Water Supply Co.*, 183 U. S. 216. It should be noted, however, that even in these cases, the opinions where used, were resorted to to support a judgment otherwise open to attack; not, as petitioner would here, resorting to an opinion to overthrow a judgment sufficient on its face when tested by the judgment roll.

3. The Theory Set Forth in the Opinion of the Trial Judge Holding That the Provision in Petitioner's Money Order Tariff Is a Provision for Liquidated Damages Is Sound and Would Support the Judgment.

Conceding arguendo that the opinion of the court could be resorted to for the purpose of impeaching the actual findings, still we contend that the theory set forth therein, namely, liquidated damages, is sound and supportable. The words used in petitioner's money order tariff are not an incantation which unfailingly invoke a provision for limitation of liability rather than a provision for liquidated damages.[3] Petitioner's tariff reads as follows:

> "In any event, the company shall not be liable for damages for delay, non-payment . . . . of this money order beyond the sum of five hundred dollars, *at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued* . . . ." [R. 57].

In *Wernick v. Western Union Telegraph*, 290 Ill. App. 569, at page 573, the court stated:

> *"Without the clause which the court (below) interpreted as liquidated damages provision*, the agreement is perfectly clear, and we do not perceive the

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[3] *Miazzi v. Western Union Telegraph Co.* (1934), 50 Ga. App. 521; *Wernick v. Western Union Tel. Co.* (1937), 290 Ill. App. 569; compare *W. U. Telegraph Co. v. Neil* (1882), 57 Texas 283, p. 289 *et seq.*, wherein the Court in construing the message provision held: "We fail to perceive on principle why in such cases the parties may not, as they did here, agree upon a sum certain in the nature of *liquidated damages*, for an error or delay arising from other cause than misconduct, fraud or want of care as above shown."

reason which prompted the telegraph company to insert the clause and thus obscure the otherwise perfectly plain intendment of the agreement."

Both courts below, likewise, interpreted the clause as a provision for liquidated damages, and the Circuit Court of Appeals in its opinion in the instant case stated that:

"When Nester delivered the $150 to appellant, he had a *right* to have the money transmitted, without unreasonable delay . . . Because of appellant's acts, that *right* was destroyed, and Nester is entitled to recover its *value*, which the parties agreed was $500."

And even petitioner, itself, admits that the provision is susceptible to such a construction and is ambiguous.[4]

Moreover, petitioner has, in our opinion, misapplied and misconstrued the decision of the court in *Miazza v. Western Union Tel. Co.*, 50 Ga. App. 521, 178 S. E. 764. In that case the court held that a provision for *liquidated damages* was in violation of the law of Georgia, and since petitioner was suing on a contract which was pleaded as such, the demurrer to the petition was good. The court did not undertake to construe the provision; it merely stated that provisions for *liquidated damages* were void in Georgia.

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[4]On page 15, footnote 22 of its brief, petitioner states in part: "There was some question when the money order tariff was adopted whether the valuation of a money order would be held invalid, since the money order—the piece of paper—can have no value, and it was thought that *some court* might insist that the only thing that was valuable was the *right* to have it paid, which had not been valued. * * *."

Not only is the construction of liquidated damages placed upon the provision sound from the point of view of the language used therein, but it can be argued, and with some force, we think, that such a construction reflects the true intention of the parties, disregarding for the moment the fact that the "other party" to the said contract had nothing to do with its framing. Petitioner's tariff makes provision for a valuation of $500 *unless* a higher value is stated. Might not a sender very well think that he had made a bargain—to be sure, not one of his own making, for he either had to take it or leave it—for the correct transmittal of his money or the payment to him of $500 for the *right* in case of default?

In the light of the foregoing, petitioner's arguments about fundamental rules of construction are not persuasive; and especially not so in view of the language used in the provision *which is of its own making.* Rather, it is our opinion, that a party who creates an ambiguity in a contract, particularly when the so-called "other party" to the contract is no way responsible therefor, should not be heard to complain that his ambiguity resulted in a construction contrary to that which he says he meant. The contract should be construed most strongly against the petitioner.[5]

The argument of petitioner on page 26 of its brief with reference to staying the enforcement of the provision until

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[5]*Weil v. California Bank*, 219 Cal. 538; *Bachman v. Independence Co.*, 214 Cal. 529; *Golden West Ins. v. Peardon*, 138 Cal. App. 481.

its validity had been passed upon by the Federal Communications Commission is inapplicable here for the reason that the cited case of *General American Tank, etc. v. El Dorado Terminal* applies only to administrative acts of the Commission; in the case at bar the Commission had already passed on the tariff and it was part and parcel of petitioner's rates.

We will not reply to the latter portion of petitioner's brief starting with the first paragraph on page 28, for the reason that such a point was not raised on appeal to the Circuit Court and by the very well known rules should not be reviewed here.

Conclusion.

For the reasons herein stated, it is our opinion that this court should dismiss the writ or affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated: Los Angeles, California. February 21, 1940.

Respectfully submitted,

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Attorneys for Respondents.

P 5.

SUPREME COURT OF THE UNITED STATES.

No. 597.—October Term, 1939.

The Western Union Telegraph Company, Petitioner, *vs.* Paul Nester and Juan Charles, Co-partners.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 22, 1940.]

Mr. Justice McReynolds delivered the opinion of the Court.

Respondents, Nester and Charles, are partners in mining operations near Aramecina, Republic of Honduras. September 1, 1937, at Los Angeles, California, petitioner, the Telegraph Company, in the ordinary course of business, received from Nester one hundred and fifty dollars for transmission by unrepeated message and delivery to Charles at Aramecina. It failed so to do.

In a "Complaint for damages for breach of duty" filed against petitioner in the District Court, Southern District, California, respondents claimed the failure to deliver resulted from gross negligence and that as a direct consequence they suffered specified losses amounting to $7,600. For that sum they asked judgment.

Petitioner denied liability and as an affirmative defense alleged—

"The money order referred to in the plaintiff's complaint was delivered to and accepted by the defendants subject to the terms of the standard money order contract of The Western Union Telegraph Company, a copy of which is hereto annexed."

It is not now denied that this standard form had been duly filed with the Federal Communications Commission and was treated by the parties as a statement of the contract between them. Certain of the conditions contained therein are printed below.[1]

The point for determination here arises out of the following condition—

"In any event, the company shall not be liable for damages for delay, non-payment or underpayment of this money order, whether

[1] Money Orders Are Subject to the Following Conditions:

Domestic orders will be canceled and refund made to the sender if payment cannot be effected within 72 hours after receipt at paying office (Ellis Island,

by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of five hundred dollars, at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued, unless a greater value is stated in writing on the face of this application and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof."

The cause was tried by the court without a jury upon the pleadings and evidence. It found as matter of fact

"That it is not true that by reason of the failure of the defendant, Western Union Telegraph Company, to transmit and to deliver and to pay promptly said money order as aforesaid, the plaintiffs have suffered damages in the sum of Seventy-six hundred ($7,600.00)

N. Y., excepted). Orders payable at Ellis Island will be canceled after the expiration of five days.

In the case of a Foreign Order the Foreign equivalent of the sum named in the order will be paid at the rate of exchange established by the Company or its agents on the date of the transfer.

In the case of a Foreign Order the equivalent, in the currency of the country of payment, of the sum named will be purchased promptly; and if for any reason payment cannot be effected, refund will be made by the Company and will be accepted by the depositor on the basis of the market value of such foreign currency in American funds, at New York, on the date when notice of cancelation is received there by the Company from abroad.

When the Company has no office at destination authorized to pay money, it shall not be liable for any default beyond its own lines, but shall be the agent of the sender, without liability, and without further notice, to contract on the sender's behalf with any other telegraph or cable line, bank or other medium, for the further transmission and final payment of this order.

In any event, the company shall not be liable for damages for delay, nonpayment or underpayment of this money order, whether by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of five hundred dollars, at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued, unless a greater value is stated in writing on the face of this application and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof.

In the event that the company accepts a check, draft or other negotiable instrument tendered in payment of a money order, its obligation to effect payment of the money order, shall be conditional and shall cease and determine in case such check, draft or other negotiable instrument shall for any reason become uncollectible, and in any event the sender of this money order hereby agrees to hold the telegraph company harmless from any loss or damage incurred by reason or on account of its having so accepted any check, draft or negotiable instrument tendered in payment of this order.

All messages included in money orders are subject to the following terms—

The company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any message received for transmission at the unrepeated message rate beyond the sum of five hundrd dollars; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any message received for transmission at the repeated message rate beyond the sum of five thousand dollars, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure messages.

Dollars; the court finds, however, that by reason of such failure, the plaintiffs have suffered and sustained damages, loss and injury in the sum of Five Hundred ($500.00) Dollars."

Evidently it was not intended by this finding to declare actual damages had been shown, as respondents' counsel suggest. After pointing out the lack of any evidence of actual loss resulting from the alleged negligence, the court's opinion asserts—"So that, assuming that the action is in tort, there is no substantial proof of any of the special damages claimed. However, the plaintiffs are not without redress."

The court found as matter of law "That the condition on the application for the transmission of the money order filed by The Western Union Telegraph Company with the Federal Communications Commission limiting its liabilities to five hundred ($500) dollars is a valid undertaking. That Paul Nester and Juan Charles, co-partners plaintiff are entitled to recover the amount of five hundred dollars ($500.00) against the Western Union Telegraph Company . . . without prejudice to their right to sue for and recover the one hundred and fifty ($150) dollars" accepted for transmission.

The condition relative to liability for $500.00, quoted above, was construed by the trial court as "a provision for liquidated damages, which entitled the sender to recovery of the minimum amount of five hundred dollars in the absence of any proof or without any offer of proof." And it said, "Hence although we are unable to award to the plaintiffs the special damages they ask, they are entitled, under the facts alleged and proved, to the sum stipulated as liquidated damages in the contract. . . . Here the plaintiffs, under the facts alleged in the complaint and proved at the trial, have shown themselves entitled to recovery, even though they were unable to prove the damages they sought."

The judgment against petitioner was affirmed by the Circuit Court of Appeals. The opinion there declares—

"Appellant contends that the provision in the money order blank was a part of the tariff filed with the Interstate Commerce Commission, and as such limited the damages recoverable to the actual damage, not exceeding $500, and that without actual damage there could be no recovery. The question presented is one of interpretation of the provision, not of validity thereof."

Also—"Here, the provision in question has a limitation of liability clause—'the company shall not be liable for damages . . . beyond the sum of five hundred dollars'. The provision also con-

tained a clause by which it was agreed that 'the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued' at $500. Although appellant contends that the clause means that such right is valued at not 'beyond the sum of' $500, the clause does not so state. It states that such right is valued at $500."

"When Nester delivered the $150 to appellant, he had the right to have the money transmitted without unreasonable delay (Western U. Teleg. Co. *v.* Crovo, 220 U. S. 354) and delivered to Charles. Moore *v.* New York Cotton Exchange, 270 U. S. 593. Because of appellant's acts, that right was destroyed, and Nester is entitled to recover its value, which the parties agreed was $500."

By its petition for certiorari the Telegraph Company presents a single question—"Does the limitation of liability provision in petitioner's money order tariff—which is substantially the same as that in its telegraph tariff—constitute a liquidated damage provision which would automatically make petitioner liable for damages in the fixed sum of $500, in case of default in service, regardless of whether or not the sender had sustained any actual damage, or is the provision rather one which fixes a maximum limit within which damages may be proved?"

We think the provision in question was not intended to prescribe a definite liability (liquidated damages), but is a limitation upon the maximum permissible recovery for actual loss or damage properly alleged and shown by evidence. The courts below erred in ruling otherwise.

Considering what has been ruled in *Western Union Telegraph Co.* v. *Esteve Bros. & Co.* (1921), 256 U. S. 566; *Western Union Telegraph Co.* v. *Czizek* (1924), 264 U. S. 281; *Western Union Telegraph Co.* v. *Priester* (1928), 276 U. S. 252, the validity of the condition before us is not open to serious doubt; and viewed in the light of its history and evident purpose it must be interpreted as imposing a limitation upon the amount which may be recovered. See, *Unrepeated Message Case*, 44 I. C. C. 670, 675, and *Limitations of Liability in Transmitting Telegrams*, 61 I. C. C. 541, 550.

The interpretation of the condition approved below would permit a recovery of five hundred dollars irrespective of the sum deposited for transmission and without requiring the sender to show any loss whatsoever. A mere failure to transmit a small sum deposited with the company might impose a heavy and utterly unreasonable burden upon the common carrier although the patron had suffered no loss.

This does not harmonize with the declared purpose of the statute to impose just and reasonable rates.

The precise question here involved has been ruled upon by two intermediate courts. *Miazza* v. *Western Union Telegraph Co.* (1935), 50 Ga. App. 521; and *Wernick* v. *Western Union Telegraph Co.* (1937), 290 Ill. App. 569, 573-574. In the first the Supreme Court of Georgia sustained a demurrer to a complaint which definitely sought to recover five hundred dollars as liquidated damages for failure properly to transmit a message. The opinion in the second cause well said—

"Although this particular clause has been a part of the rules, regulations, classifications and tariffs of the telegraph company since 1921, it has never been interpreted as a liquidated damage provision, and no cases are cited which would justify such an interpretation. Reading the agreement as a whole, as it must be read under the fundamental rules of construction, and taking into consideration the historical reasons for changing the legal relationship between telegraph companies and their patrons through federal legislation, and the effect thereof as stated by the court in *Western Union Telegraph Co.* v. *Esteve Bros. & Co.* and the *Priester* case, *supra*, we think the court was unwarranted in interpreting the language employed as a liquidated damage clause. In so doing, it evidently failed to consider the intent, purpose and meaning of the entire clause, and considered only the words 'at which amount the right . . . is hereby valued.' The fair interpretation of the provision as a whole must necessarily give effect to the plainly expressed clauses which precede and follow the so-called liquidated damage provision, stating that '*in any event, the company shall not be liable for damages* for delay, nonpayment or underpayment of this money order, whether by reason of negligence on the part of its agents, servants, or otherwise, *beyond the sum of* $500 . . . , unless a greater value is stated in writing on the face of this application and an additional sum paid or agreed to be paid, based on such value, equal to one-tenth of 1 per cent thereof.' The provision, when read in its entirety, was clearly intended to fix, not a definite liability, but a maximum liability or agreed valuation upon which the rate to be paid for the shipment or carriage is to be collected."

The challenged judgment must be reversed. The cause will be remanded to the District Court for further proceedings in harmony with this opinion.

Reversed.